Date: 20231201

File: 566-32-46703

Citation: **2023 FPSLREB 112**

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

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BETWEEN

MONICA SCHILLER

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
Schiller v. Canadian Food Inspection Agency

In the matter of an individual grievance referred to adjudication

Before: Edith Bramwell, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Chantale Mercier, Public Service Alliance of Canada

For the Employer: Jason Bruder, Canadian Food Inspection Agency

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Decided on the basis of written submissions,
filed February 10 and March 20 and 30, 2023.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Monica Schiller ("the grievor") was appointed on a determinate basis as an import/export program assistant at the Canadian Food Inspection Agency ("the employer") beginning on August 21, 2017, and ending on March 29, 2018, at the CR-04 group and level. The grievor's term appointment was extended and was set to end on March 31, 2020.

[2] On February 7, 2020, the grievor was informed that her term appointment would not be extended beyond March 31, 2020. The employer emailed her the following:

> …
>
> *This is to confirm, as per our conversation today, that your term is not being extended beyond March 31, 2020. In order to support you to pursue other work, we will place you on paid leave until March 31, 2020. You do not need to report to work. Should you need to come into the office between now and March 31, please contact myself or Heather to make the arrangements.*
>
> …

[3] The grievor filed a grievance challenging the termination of her employment and alleging that the employer failed to fulfil its duty to accommodate her to the point of undue hardship, that it failed to resolve a harassment issue, and that its actions — including the non-renewal of her term appointment — constituted discrimination, in violation of article 18 of the collective agreement between the Canadian Food Inspection Agency and the Public Service Alliance of Canada (PSAC) for the Clerical and Regulatory Group, which expired on December 31, 2018 ("the collective agreement") and the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*). She stated this in the grievance:

> *I grieve my termination of employment along with the following:*
>
> > *1. I grieve the Employer's failure to fulfill its duty to accommodate me to the point of undue hardship*
> >
> > *2. Unresolved Harassment issue – other noted incidents and October 18, 2019 unresolved*
> >
> > *3. The Employer's actions constitute discrimination, which is a violation of my collective agreement and the Canadian Human Rights Act (CHRA).*

…

[4] On February 10, 2023, the grievor referred her grievance to adjudication under s. 209(1)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *FPSLRA*”), which reads as follows:

209 (1) *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee’s satisfaction if the grievance is related to*	***209 (1)*** *Après l’avoir porté jusqu’au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n’est pas un* membre*, au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada*, peut renvoyer à l’arbitrage tout grief individuel portant sur :*
(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award ….*	***a)*** *soit l’interprétation ou l’application, à son égard, de toute disposition d’une convention collective ou d’une décision arbitrale;*

[5] As required by s. 210(1) of the *FPSLRA*, notice was given to the Canadian Human Rights Commission that the grievance raised an issue involving the interpretation or application of the *CHRA*. To date, the Canadian Human Rights Commission has not informed the Federal Public Sector Labour Relations and Employment Board (“the Board”, which in this decision refers to the current Board and any of its predecessors) whether it intends to make submissions in this matter.

[6] On March 20, 2023, the employer responded to the grievor’s reference to adjudication and objected to the Board’s jurisdiction to hear the grievance.

[7] For the reasons that follow, I dismiss the employer’s objection.

II. Summary of the arguments

[8] The employer raises the following points in support of its objection.

[9] First, the employer submits that the “… referral to the Board in our current case as outlined in the Form 20 as filed does not correctly indicate the type of grievance that the Grievor seeks to refer to adjudication”. It submits that the essence of the grievance is not the discrimination allegations but the grievor’s alleged termination. As

such, it submits that the grievance should not have been referred to adjudication under s. 209(1)(a) of the *FPSLRA* but under either s. 209(1)(c) or s. 209(1)(d), which, among other things, deal with terminations. The employer stated this:

> …
>
> *However, the first line of the grievance reads, "I grieve my termination of employment", and the first corrective action requested reads, "the employer immediately revoke my termination". The Employer therefore respectfully submits that the accurate characterization of the grievance should be under S. 209(1)(c) or 209(1)(d).*
>
> …

[10] Second, the employer submits that in any case, the grievor's employment was not terminated. To the contrary, the employer alleges that she was appointed to a specified term of employment on August 21, 2017, and that the extension of her term appointment ended on March 31, 2020, without a further extension. The employer states that the decisions in *Ikram v. Canadian Food Inspection Agency*, 2012 PSLRB 4, and *Shenouda v. Treasury Board (Department of Employment and Social Development)*, 2017 PSLREB 21, held that the non-renewal of a term appointment is not a dismissal or termination for the purposes of s. 209(1) of the *FPSLRA*. As such, the employer submits that the Board would also not have jurisdiction to hear the grievance under ss. 209(1)(c) or (d).

[11] Third, the employer submits that if the Board determines that it does not have jurisdiction to hear the matter of the non-renewal of the grievor's term appointment, then it will not have jurisdiction to hear the discrimination allegations, as follows:

> …
>
> *The Employer therefore further submits that the first test for the Board in the current case is to determine whether the Board has jurisdiction to hear the matter relating to the end of the Grievor's term employment. If it is found to be outside the jurisdiction of the Board to hear the grievance, then any allegations of discrimination also fall outside this jurisdiction.…*
>
> …

[12] Fourth, the employer submits that it is designated a "Separate Employer" for the purposes of s. 209(1)(d) of the *FPSLRA* by the *Federal Public Sector Labour Relations Act Separate Agency Designation Order* (SOR/2005-59), and that its authority to

appoint individuals is under the *Canadian Food Inspection Agency Act* (S.C. 1997, c. 6), and that as the grievance relates to staffing, it is outside the Board's jurisdiction.

[13] In response to the employer's objection, the grievor submits that the grievance was properly referred to adjudication under s. 209(1)(a) of the *FPSLRA*. She states that her grievance raised several issues, which she then narrowed down at adjudication to those over which the Board would have jurisdiction, namely, allegations that "… the employer repeatedly breached the provisions of the collective agreement of Article 18 (No Discrimination)." She submits that the essence of her grievance concerns allegations of a breach of the collective agreement that can be determined at adjudication under s. 209(1)(a).

[14] The grievor submits that *Ikram* and *Shenouda* are distinguishable from her grievance as the grievances in those cases challenged the non-renewal of a term appointment as a "termination" or "dismissal" under ss. 209(1)(c) or (d) of the *Public Service Labour Relations Act* ("*PSLRA*"), as the *FPSLRA* was then named, and not as a violation of a collective agreement under s. 209(1)(a). She submits that the decision in *Togola v. Treasury Board (Department of Employment and Social Development)*, 2014 PSLRB 1, supports her position that the Board has jurisdiction over the non-renewal of a term appointment when it is alleged to be a discriminatory violation of the collective agreement.

[15] Accordingly, the grievor requests that the Board dismiss the employer's objection.

III. Reasons

[16] The employer argues that the essence of this grievance is a challenge to the non-renewal of the grievor's term employment and that as a result, the Board has no jurisdiction over any aspect of the grievance referred. This argument mischaracterizes the matters grieved.

[17] Specifically, the employer submits that the first question to determine is whether the Board has jurisdiction to examine the grievor's alleged termination. If not, the employer submits that the Board does not have jurisdiction to hear her discrimination allegations. I do not share that view. Rather, the question is whether the

allegations raised fall within the adjudicable grounds as defined by s. 209(1) of the *FPSLRA*.

[18] As noted above, the terms and conditions of employment of the grievor's employment are governed by the collective agreement. Article 18 of that agreement reads as follows:

> ***18.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, gender identity and expression, family status, mental or physical disability, membership or activity in the Union, marital status or a conviction for which a pardon has been granted.*
>
> …

> ***18.01*** *Il n'y aura aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire exercée ou appliquée à l'égard d'un-e employé-e du fait de son âge, sa race, ses croyances, sa couleur, son origine ethnique, sa confession religieuse, son sexe, son orientation sexuelle, son identité sexuelle et l'expression de celle-ci, sa situation familiale, son incapacité mentale ou physique, son adhésion au Syndicat ou son activité au sein de ce dernier, son état matrimonial ou une condamnation pour laquelle l'employé-e a été gracié.*
>
> […]

[19] Although the non-renewal of a term appointment is not a "termination" or "dismissal" for the purpose of ss. 209(1)(c) or (d) of the *FPSLRA* (see *Ikram*, at para. 8), this is not to say that the Board cannot inquire at adjudication whether the non-renewal of a term appointment was discriminatory, where the discrimination is grieved as a violation of the collective agreement. Several decisions have held that grievances challenging a non-renewal of a term appointment or a rejection on probation that is alleged to have been a discriminatory, or in violation of a collective agreement, can be examined at adjudication in the context of a reference to adjudication under s. 209(1)(a).

[20] For example, in *Togola*, cited by the grievor, Mr. Togola referred a grievance to adjudication in which he alleged that his employer refused to renew his term appointment on discriminatory grounds. Mr. Togola's employer objected to the jurisdiction of an adjudicator on the basis that the non-renewal of a term appointment

was outside the adjudicator's jurisdiction. Mr. Togola responded that the grievance was within the jurisdiction of the adjudicator as the non-renewal was based on discriminatory grounds, in violation of a collective agreement that fell within the adjudicator's jurisdiction.

[21] Although ultimately, Mr. Togola's discrimination allegations were found not supported by the evidence, the adjudicator, relying on an earlier decision (*Medeiros v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2012 PSLRB 104), held as follows at paragraph 91 that if Mr. Togola had established that he was a victim of discrimination, she would have had jurisdiction to hear the grievance:

> *91 My opinion is that in a case such as this, in which employment was terminated because a contract was not renewed under section 58 of the* PSEA*, in principle, I do not have jurisdiction to hear the grievance, unless the grievor can prove that he was a victim of discrimination. If so, then I have jurisdiction under subsection 209(1) and paragraph 226(1)(*g*) of the* Act *to hear the grievance. Thus, I concur with the adjudicator's conclusions in* Medeiros*, who had to hear two grievances, one of which involved a contract not being renewed, and the other, an issue of discrimination ….*

[22] Accordingly, when a collective agreement prohibits discrimination and an employee grieves that the contested action violated that collective agreement in that respect, the grievance may be heard at adjudication as a grievance concerning the interpretation or application of a collective agreement under s. 209(1)(a) of the *FPSLRA*.

[23] In support of its submission that if the Board does not have jurisdiction to hear the grievor's challenge to the non-renewal of her term appointment, then it does not have jurisdiction to hear the discrimination allegations, the employer cites paragraph 53 of *Shenouda*, which states the following:

> ***53*** *The Board does not have freestanding jurisdiction over issues of alleged human rights violations, which was addressed in* Chamberlain*. The adjudicator in that case reviewed the matter in detail. I agree with and accept the adjudicator's related reasoning and findings, specifically as follows ….*

[24] I agree with the grievor's submission that the facts of *Shenouda* are distinguishable from the current matter. *Shenouda* does not stand for the proposition that discrimination allegations concerning the non-renewal of a term appointment cannot be referred to adjudication. Rather, the issue in that case was whether Ms.

Shenouda was entitled to raise those issues in the context of a referral to adjudication under s. 209(1)(c) of the *PSLRA*. She had not raised discrimination allegations within the individual grievance process, nor had the allegations been referred to the Board pursuant to s. 209(1)(a), as violations of the collective agreement. Only once the grievance referred under s. 209(1)(c) was already at adjudication did Ms. Shenouda allege, for the first time, that her employment had been terminated due to discrimination.

[25] Ms. Shenouda's employer successfully argued that a grievance concerning the non-renewal of a term appointment could not be referred to adjudication under s. 209(1)(c) of the *PSLRA* (see *Shenouda*, at paras. 15, 16 and 50). Since the Board did not have any jurisdiction over the non-renewal of term employment under s. 209(1)(c), any allegation of discrimination was also outside of its jurisdiction in the context of a under s. 209(1)(c) referral.

[26] Ms. Shenouda's employer acknowledged that the Board may have jurisdiction, under s. 209(1)(a) of the *PSLRA*, to hear a grievance concerning the non-renewal of a term appointment when it is alleged to be a discriminatory action in violation of a collective agreement (see *Shenouda*, at para. 19).

[27] *Shenouda* does not support the employer's position that violations of the discrimination article of the collective agreement relating to the non-renewal of term employment cannot be heard at adjudication. I do not find *Shenouda* helpful in addressing the circumstances of the present case, where the referral to adjudication has been made under s. 209(1)(a).

[28] In her grievance, the grievor alleges that the employer violated the collective agreement in several ways. Although one of these allegations relates to the non-renewal of her term employment, the essence of her grievance is that the employer's actions constitute discrimination in violation of the collective agreement. In such circumstances, her grievance may be referred to adjudication under s. 209(1)(a) of the *FPSLRA*.

[29] Further, a grievance that raises discrimination allegations as collective agreement violations is not the same as a grievance that raises "freestanding … human rights violations" as referred to in *Shenouda*, interpreting *Chamberlain v. Canada (Attorney General)*, 2015 FC 50. The holding in *Chamberlain* was that an adjudicator

did not have jurisdiction to hear a grievance that **only alleged violations of the *CHRA***; *Chamberlain* did not hold that the adjudicator could not hear a grievance that was limited to discrimination allegations.

[30] The Board's jurisdiction to hear the grievor's allegations of discrimination as collective agreement violations stems from s. 209(1)(a) of the *FPSLRA*. Such a grievance may indeed consist, in its entirety, of discrimination allegations, where the allegations reference a collective agreement violation, as is the case here. Contrary to the employer's submissions, the jurisdiction to hear such allegations at adjudication is not dependent on another matter having been properly referred to adjudication.

[31] The grievor alleges distinct discriminatory actions, namely, the employer's failure to meet its duty to accommodate, its failure to provide a harassment-free workplace, and its discriminatory refusal to renew her term appointment. She alleges that these acts constitute violations of both the collective agreement and the *CHRA*. As issues concerning the interpretation or application of the collective agreement, each of her allegations falls within the ground of adjudication set out in s. 209(1)(a) of the *FPSLRA*. Even were the Board to determine on the merits that the non-renewal of the grievor's term appointment did not constitute, in fact, a discriminatory action, the grievor's remaining two allegations, on their own, could still be determined at adjudication under s. 209(1)(a).

[32] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IV. Order

[33] The employer's objection is dismissed.

[34] The matter will be set down for a hearing in accordance with the Board's usual practice.

December 1, 2023.

Edith Bramwell,
a panel of the Federal Public Sector
Labour Relations and Employment Board